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JOHN F. DAVIS, CLE

Supreme Court of the United States

October Term, 1969

No. 1374

MARTIN A. BEATTY,

Petitioner,

vs.

RANDOLPH K. ELLINGS, CITY OF WINONA, HOUSING AND REDEVELOPMENT AUTHORITY OF WINONA, GEORGE M. ROBERTSON, JR., JAMES BRONK, MARLOWE BROWN, JAMES McCABE, HAROLD BRIESATH, DANIEL BAMBENEK, HENRY V. PARKS, MURIEL OLLOM, JIM D. MOHAN, HAROLD THIEWES, JAMES V. STOLTMAN, NEIL SAWYER, BARRY NELSON, DAVID L. JOHNSTON, DONALD KLAGGE, JERRY BORZYSKOWSKI, ALLYN S. MORGAN, JR., L. W. GOLDBERG, N. J. FISCHER, JOSEPH E. KRIER, WM. J. THUROW, FRANZ CUNNINGHAM, WM. O. FINKELNBURG, E. J. SIEVERS, PHILIP BAUMANN, JAMES T. SCHAIN, NORMAN E. INDALL, WM. F. WHITE, JAMES FOSTER, JERRY PAPENFUSS, FRANK G. MERTES, DONALD GRAY, HOWARD KELLER, REPUBLICAN HERALD PUBLISHING COMPANY, JAMES B. GOETZ, RADIO STATION KAGE, GEM RADIO STATIONS CO., JAMES B. GOETZ, MERLIN J. METHALER and REX N. EYLER, co-partners, doing business as WINONA BROADCASTING CO., KWNO BROADCASTING CO., CHAMBER OF COMMERCE OF WINONA, DONALD STONE, and ARNOLD STOA,

Respondents.

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF THE STATE OF MINNESOTA

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To the Justices of the Supreme Court of the United States:

This is a petition by Martin A. Beatty for a writ of certiorari to review a judgment of the Supreme Court of Minnesota entered in the above action on January 5, 1970.

CITATION OF THE OPINION BELOW

The above entitled cause is not yet officially reported. It is unofficially reported in 173 N.W.2d 12.

JURISDICTIONAL STATEMENT

The Judgment sought to be reviewed was dated and entered in the office of the Clerk of the Supreme Court of Minnesota on January 5, 1970. It is reprinted in attached Appendix (A. 1). A certified copy of such judgment was duly filed in the District Court of Winona County and Third Judicial District of Minnesota on January 7, 1970.

Earlier, upon appellant's Application for Reargument, an order of the Supreme Court of Minnesota was made and filed on November 7, 1969, staying further proceedings pending its determination.

U.S.C.A. Sec. 1257(3) is the statutory provision believed to confer jurisdiction on this Court.

QUESTIONS PRESENTED

(1) Does the local citizen have a constitutional right to attend all of the meetings of the local public bodies when the public business is discussed?

(2) Does the local citizen have a constitutional right to see and read the letters, papers and documents of the local public bodies?

(3) Where a citizen, resident, taxpayer who is neither a public official nor a candidate for public office speaks out only at the meetings of the public bodies in opposition to a public program fostered by the public bodies, but only when permitted to do so, and all the while conducting himself in a lawful, decorous and proper manner; who belongs to no sponsoring organization; who neither solicits nor receives financial support; and who does not have access to newspapers,

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radio or television and has not contributed statements to the local news media—

Is such person a "public figure" within the rule of *New York Times Co. v. Sullivan,* even though he has:

a. Pointed out by letter to local, state and national officials deficiencies, etc., in the program.

b. Upon very infrequent occasions alerted the news media by letter concerning the response of public officials to such opposition.

c. Sent a copy of only one of his letters to City Council members to the entire local membership of defendant Chamber of Commerce, therein describing how its officers had interfered with him when he sought to attend a meeting of all of the Council members and of all of the WHRA members held at the Chamber Building.

d. Sent one letter to the Board Chairman of the private bank where WHRA meetings were held as a memo of a conversation about an alleged slander of plaintiff thereat?

CONSTITUTIONAL PROVISIONS INVOLVED

U. S. Constitution, Amendment I.

Congress shall make no law respecting an establishment of religion, or prohibiting the free exercise thereof; or abridging the freedom of speech, or of the press; or the right of the people peaceably to assemble, and to petition the Government for a redress of grievances.

U. S. Constitution, Amendment V.

No person shall be held to answer for a capital, or otherwise infamous crime, unless on a presentment or indictment of a Grand Jury, except in cases arising in the land or naval forces, or in the Militia, when in actual service in time of

War or public danger; nor shall any person be subject for the same offense to be twice put in jeopardy of life or limb; nor shall be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law; nor shall private property be taken for public use, without just compensation.

U. S. Constitution, Amendment IX.

The enumeration in the Constitution, of certain rights, shall not be construed to deny or disparage others retained by the people.

U. S. Constitution, Amendment X.

The powers not delegated to the United States by the Constitution, nor prohibited by it to the States, are reserved to the States respectively, or to the people.

U. S. Constitution, Amendment XIV, Section 1.

All persons born or naturalized in the United States, and subject to the jurisdiction thereof, are citizens of the United States and of the State wherein they reside. No State shall make or enforce any law which shall abridge the privileges or immunities of citizens of the United States; nor shall any State deprive any person of life, liberty, or property, without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

STATEMENT OF THE CASE

This is an action to recover damages arising out of a conspiracy to interfere with plaintiff's civil rights and to defame him. The claim includes $2,000 of alleged special damages.

The complaint alleges a conspiracy by city officials and others to interfere with, circumscribe and limit, and deny to plaintiff certain rights and privileges and to ruin his

reputation as an attorney and citizen by public vilification; and to thereby render nugatory plaintiff's lawful exercise of his citizen's rights, including the right to lawfully oppose urban renewal and to defend against any unlawful taking of his realty and his right to own realty.

The defendants include city officials who were, or had been, members of three public bodies, namely: the Planning Commission, the City Council and the Housing and Redevelopment Authority, abbreviated as WHRA. The City of Winona and WHRA are defendant municipal corporations. The Mayor, City Attorney, Police Chief and two policemen are also named defendants, along with the three local news media and their respective publishers, and the corporate Chamber of Commerce of Winona, hereinafter referred to as Chamber of Commerce, Donald Stone, its Executive Secretary, and its (former) President, Arnold Stoa.

The complaint alleges that all defendants participated in the conspiracy, but specific torts were also committed in the course of the execution of the conspiratorial plan. Public slanders are alleged as follows: by WHRA member Krier in pars. 16 and 21; by Mayor Ellings in par. 20; by Alderman Mohan in par. 22; by Planning Commissioner Papenfuss in par. 23. A libel by Chairman Finkelnburg and the members of WHRA and the three news media is alleged in par. 17 and a separate libel published in Winona Daily News is alleged in par. 18. A false arrest and imprisonment involving Police Chief McCabe, two policemen and five aldermen is alleged in par. 19. Each of those torts could be maintained as independent suits; and each violation of a civil right is a tort.

The action was brought in the state District Court of Winona County and Third Judicial District of Minnesota.

Plaintiff's evidence shows generally that starting in 1963 he sought to keep informed about and to lawfully oppose

federally-assisted urban renewal in Winona where he owns a building housing his office located in the General Neighborhood Renewal Plan area.

In 1963 the Council held meetings on the 1st and 3rd Mondays of each month commencing at 7:30 P.M. in the large hall of the Municipal Building which otherwise served as and was called the Courtroom of the Municipal Court. Such meetings were conducted in a formal manner and minutes were kept. The defendants contend that no ordinances can be enacted at meetings not so constituted. Except as to a recess feature of such meetings, the citizens were free to attend and frequently did so. Such meetings will be referred to herein as "regular meetings."

Other meetings of council members were held on the off Monday[1] evenings, on other days of the week, and at varying times of the day. Such meetings were variously referred to as "committee of the whole meetings" or "committee meetings" or "special meetings" or "adjourned meetings." For clarity all except "regular meetings" will be herein referred to as "irregular meetings."

By either designation the reference is to a meeting where a quorum or more of the council members are in attendance. At such meetings their activity includes, at the very least, a discussion of the public's business.

The irregular meetings were usually held in a separate room in the Municipal Building where the council members sat around a table. The room was of a size adequate to accommodate the members but much smaller than the Municipal Court room. These rooms are hereafter referred to as the "Courtroom" and the "small room."

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[1]The practice was not entirely uniform, because sometimes regular meetings were held on the 2nd, 4th or 5th Mondays, in the Courtroom in a formal manner, as adjourned meetings or extra meetings.

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Irregular meetings were also held in the small room before the regular meetings, starting at such various times as 6:00 P.M., 6:30 P.M. and 7:00 P.M.

In 1963 at the regular meetings the Council customarily attended to some business in the Courtroom and then recessed to the small room where discussions of the public's business continued for indefinite periods of time.

This custom of meeting during recess will be herein included in the designation "irregular meeting," and it will be separately characterized as "irregular recess meeting." After the irregular recess meeting the practice was that the Council returned to the Courtroom, continued with the handling of the public's business, sometimes passed ordinances and/or resolutions, and in due course concluded the business. All of the irregular meetings appear to be covered by the term "Executive Session" found in case law discussions. (See: *Blum v. Board of Zoning and Appeals*, 1 Misc. ed. 668, 149 N.Y.S.2d 5 at p. 8.)

Beginning in about early 1964 plaintiff began a sustained effort to attend the irregular recess meetings. Some time later plaintiff, at first by accident, and thereafter by purposeful search, learned from time to time of other irregular meetings. He then endeavored to attend them also.

During that time members of the general public were not admitted but selected individuals were admitted from time to time to discuss specific matters with the council. Members of the news media were in attendance at many of the irregular meetings.

Plaintiff's efforts to attend irregular meetings of the Council met with continued interferences and harassments, some of which were the following, to-wit: (1) being barred, (2) holding unannounced "special" meetings, (3) closed door meetings, (4) told "You cannot come in," (5) crowding plaintiff out, (6) pushing plaintiff out, (7) plaintiff's in-

quiries to determine meeting times were unsuccessful, (8) ordered out of meeting, (9) abortive attempt to intimidate plaintiff to leave meeting by summoning policemen, (10) Council tried to condition plaintiff's attendance at irregular meetings on condition that plaintiff "would not divulge anything that was said," (11) attempted intimidation by interrogation by policemen on orders from police headquarters, (12) vilified at Council meetings by being falsely characterized as (a) a "liar" by the Mayor, (b) one who is "interfering with our work" by a councilwoman, (c) "a trouble maker" by some members of the Council, (13) holding unannounced irregular meetings at Chamber of Commerce Building, (14) attempt to condition plaintiff's attendance at irregular meeting on condition that he agree that the meeting was in fact a Chamber of Commerce Parking Committee meeting, (15) falsely arrested and imprisoned by being carried bodily from an irregular meeting without cause or provocation and prevented from re-entering during meeting, (16) privately impliedly threatened by City Attorney, (17) challenged to alley fight by Mayor, (18) by the action of Council president who admittedly tried to keep plaintiff from attendance at meetings of a Council quorum from 9/8/64 to 4/12/65, (19) by meeting secretly at the Chamber of Commerce Building on 9/9/64 to conduct the public business intended to but not conducted because of plaintiff's attendance at meeting at City Hall on 9/8/64.

Plaintiff's efforts to attend WHRA meetings met with interference and harassments such as: (1) being asked at a WHRA meeting by WHRA member Joseph E. Krier, "What are you doing here? Why aren't you at your office?", "Does your wife put you up to this?", "I think you ought to see a psychiatrist." (2) by meeting in a room in a private bank so small that plaintiff citizen was able to attend only by sitting in the next room.

Plaintiff was also denied and not furnished certain public information by the three public bodies on several occasions, although none of such requested information concerned any military or diplomatic secrets.

Some, but not all, of the public information denied to plaintiff after his request therefor are these, to-wit: (1) an urban renewal map, (2) the educational qualifications of City Planner Wolfgang Roeseler, (3) knowledge of a planning grant during the period from 9/3/63 to 10/28/63, (4) the times, and sometimes the places, of a good many meetings of full quorums of public bodies, although requested in writing, (5) denied by WHRA on 6/15/65 permission to see a marketability study, (6) denied by WHRA on 5/9/66 permission to see the "confidential" marketability study report prepared by Larry Smith Co.

Plaintiff has spoken at meetings of the public bodies about urban renewal and about secret meetings only when recognized to do so.

Respondents, hereinafter referred to as defendants, have not claimed that plaintiff headed or was ever associated with any group or association organized or existing for the purpose of opposing federally-assisted urban renewal, or for the purpose of opposing secret meetings of the public bodies, and the record contains no evidence of any such group or groups. Defendants have not claimed that plaintiff solicited any funds or was provided any funds to support his efforts; and the evidence is that such was not the case. Excepting his statements at the meetings of the official public bodies, the defendants have not claimed that plaintiff participated in any form of a publicity campaign to foment opposition to urban renewal and/or secret meetings; and there is nothing in the record that would support such a claim.

On but one occasion did plaintiff appear otherwise than in his private capacity. At the council meeting of 3/14/66

he appeared as "spokeman for four 3rd Street small business proprietors," qualifying his role by "explaining that the views he expressed were not theirs in every instance."

Plaintiff also sought facts about the two issues and pointed to inconsistencies, etc., concerning them in a number of letters to local public officials, and to some state and federal officials. Copies of plaintiff's letter of 11/14/64 to Council members were sent to the large local membership of defendant Chamber of Commerce. This letter protested "the unbelievable difficulties which I (plaintiff) as a citizen continue to encounter in simply trying to exercise my constitutional and statutory civil right to attend meetings of official public bodies." The letter recited some of the frustrations, interferences and harassments in relation to earlier meetings, and includes a detailed account of the difficulties plaintiff encountered in his ultimately successful attempt to attend a combined meeting of all members of the City Council, and all members of WHRA at the defendant Chamber of Commerce of Winona's building on 11/9/64.

During the period from mid-1963 through August, 1966, although he frequently wrote directly to public officials, his other correspondence about urban renewal and secret meetings was slight. It consisted entirely of the following:

—To Winona Daily News five letters noting misquotations of plaintiff, and a letter calling the newspaper's attention to an unreported secret meeting, "although known to the press."

—To defendant Radio Station KAGE of Winona on 3/25/66 and to its affiliate, defendants James B. Goetz, et al., d/b/a Winona Broadcasting Co., on 3/30/66, correcting a probable misquotation of plaintiff.

—To Minneapolis Tribune on 6/17/64 enclosing a copy of plaintiff's letter of 6/17/64 to the State Public Exam-

iner requesting an investigation, for the stated purpose following, to-wit:

> "I am sending this copy to a representative of the press in the hope that the State Public Examiner may be less inclined to disregard it, knowing that the press has been alerted";

and also a copy of plaintiff's second letter to the State Public Examiner dated 6/29/64, which included this cautionary reminder, to-wit:

> "This communication is not intended as a so-called 'Letter to the Editor'."

—Letters on 12/3/64 and 12/10/64 to Pat McCarty, Reporter, Minneapolis Tribune, commending him upon his article entitled "City Hall Secrecy Said Growing," the first letter expressly stating:

> "My letter is not submitted as a 'Public Pulse' or 'Letter to the Editor'."

Also copies of three of plaintiff's letters to public bodies were sent to Winona Daily News, and local radio stations KAGE and KWNO; and plaintiff sent copies of his letter to the Council of 5/1/65 about academic freedom, a subject irrelevant to this suit, to University of Minnesota Daily and three other non-local newspapers. A copy of *one other letter* was also sent to the University of Minnesota Daily.

Once plaintiff wrote the Board Chairman of Winona National and Savings Bank concerning a slander allegedly spoken by the Vice Chairman of WHRA at a public meeting of WHRA in such private bank.

The plaintiff was not a public official, nor a candidate for office.

Following are the facts about some of the irregular meetings:

Despite the fact that plaintiff had asked the Council that he and the other members of the public be advised of all of the Council meetings, in advance thereof, seven of the nine Council members attended a meeting at the Chamber of Commerce on 11/4/64, kept secret from the public, at which they agreed to authorize an engineering study of off-street parking, being a subject interrelated with urban renewal. The Council held a secret meeting at the Chamber of Commerce Building on or about September 9, 1964 with W. E. Morse, Executive Director of Winona Industrial Development Assn. after an unannounced 7:00 P.M. meeting of Council members with Mr. W. E. Morse at City Hall on 9/8/64 was aborted when plaintiff citizen declined to leave.

The Council members met at the Chamber of Commerce building on another occasion before 11/9/64, and the Planning Commissioners had similarly met there. Plaintiff was denied permission by the Chamber of Commerce to attend two of such meetings, and he did not attend them.

A meeting of Council members and the Chamber of Commerce in the Chamber's conference room at the Chamber of Commerce building which had been arranged for 9/24/64 without public knowledge, was cancelled when plaintiff citizen learned of it. The fact that such meeting had been arranged was falsely denied by Councilman Sawyer.

A meeting of the entire Council and WHRA memberships and the Executive Secretary and some members of the Chamber of Commerce was held at the Chamber of Commerce building on 11/9/64 with WHRA's Vice Chairman, defendant Joseph E. Krier presiding. Plaintiff tried from about 1:40 P.M. to determine if a meeting of the Council members or WHRA members was to be held that evening, but by 5:00 P.M. he had not found out. Efforts were made to prevent plaintiff's attendance. Defendant Stoa, President of the

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Chamber of Commerce, told plaintiff that he would "not be admitted" to the Chamber of Commerce building.

Parking problems relevant to urban renewal were discussed, and the members of WHRA instructed their Executive Secretary to phone Chicago to determine if non-cash credits could be produced by the city expending funds on parking projects.

It is established, with but one exception, that the alleged conspiratorial slanders by the public officials were all publicly stated at the meetings of the public bodies. An instance not previously cited occurred at a Planning Commission meeting, as follows:

> Planning Commissioner Papenfuss—"You god damn son of a bitch, you little son of a bitch, you son of a bitch, I ought to throw you out the window."

During the period from 9/8/64 to 4/12/65 Council President Briesath admittedly tried to prevent plaintiff's attendance at all but formal Monday evening Council meetings at 7:30 P.M.

Plaintiff was attending a meeting of the Council in the Small Room in City Hall on Monday, 4/12/65. His conduct was lawful, decorous and proper. He was carried bodily from the room by two police officers and imprisoned without cause or provocation after he was ordered to leave by Council President Briesath, and declined to leave. Plaintiff asked defendant police officers and defendant Chief of Police McCabe of what offense he was accused, but they did not state that plaintiff committed any. Plaintiff was not charged with any offense. President Briesath termed the meeting a caucus meeting.

The complaint in paragraphs 17 and 18 alleges libels as parts of the conspiratorial plan. The libel alleged in par. 18 was published by Winona Daily News.

The libel alleged in par. 17 involved the news media and public officials. Having decided to reply to certain remarks made before the Council on March 14, 1966 by plaintiff, defendant Finkelnburg, Chairman of WHRA, in the afternoon of March 15, 1966 prepared some part of a statement. The statement was typewritten before the WHRA meeting held on that evening. At such meeting Finkelnburg publicly read such statement which was about plaintiff only, mentioning him eleven times.

It was allegedly derogatory. It contained these statements, to-wit:

> "The Winona City Council listened last night as Winona Attorney Martin A. Beatty, a spokesman for four Winona businessmen, spoke on what he feels are defects in the proposed redevelopment plan for the 30-block downtown area of Winona."
>
> "* * * The last part of his speech concerned what I construe to be personal attacks on the character and personal honesty of various public officials, * * *."
>
> "* * * We have always welcomed intelligent * * * criticism and suggestions."
>
> "* * * We do now, * * * welcome intelligent, constructive and well-thought-out suggestions."
>
> "* * * The kind of emotional tirade to which the council was subjected * * *."
>
> "* * * He resorts to what I consider an attempt at character assassination * * *."
>
> "I would like to point out how totally irresponsible some of the statement are * * *."
>
> "The belabored efforts * * * to show * * * that certain individuals expect to obtain an advantage through prior knowledge by recent purchases of land abutting Huff Street, between 5th and Broadway, is ridiculous."
>
> "I think the time has now passed when we need devote any further time to irresponsible, inconsistent at-

tacks on the plan or upon the character and honesty of public officials * * *."

"Character assassination is the last resort of persons so governed by prejudice that they cannot or will not use logic and reason. The fact that Mr. Beatty feels it necessary to stoop to this shameful tactic clearly shows his lack of a legitimate or constructive contribution * * *."

Plaintiff's Demand for Retraction was served upon all members of WHRA and the news media defendants, and none retracted.

Chairman Finkelnburg, speaking for himself and the other WHRA members, had earlier on 1/18/66 made a public statement about plaintiff, naming him, at a WHRA meeting.

* * * * * *

The stage of the proceeding and the manner in which the respective federal questions were raised are as follows.

(1) The issue of the Constitutional right of the local citizen to attend all of the meetings of the local public bodies, when the public business is discussed.

The issue was first raised by plaintiff's complaint, the pertinent allegations of which are these, to-wit:

Par. 10 (paraphrased) * * * That the objectives of such (conspiratorial) "plan" have been, and they are, as follows:

a. To wrongfully and unlawfully interfere with, limit and deny to plaintiff his lawful rights and privileges as a citizen, resident and taxpayer of the City, the State of Minnesota and of the *U. S. A.* (Emphasis added.)

b. To wrongfully interfere with plaintiff's exercise of his lawful rights by words and acts calculated to intimidate plaintiff;

* * *.

e. And thereby to deny plaintiff lawful government and the benefits thereof and render ineffective and nugatory plaintiff's lawful exercise of his political rights including his right to lawfully oppose urban renewal * * *.

The issue was again raised by propounding legal questions to plaintiff during defendants' pre-trial examination of plaintiff on Discovery Deposition preparatory to defendants' Motions for Summary Judgment of Dismissal. Such questions follow. (The portions of such depositions taken by reporter Paulson being designated by the letter "P," and those taken by reporter Carney being designated by the letter "C," to-wit:)

(C. 130:)

"A. Well, the ultimate fact and conclusion of law from what I looked up is that a citizen has the right to attend meetings of public bodies.

Q. That isn't what we are talking about, we are talking about what is or what is not a public meeting, and you have stated here that any time a quorum is present that that constitutes a meeting and that you are entitled to attend; I want to know what your authority is for that statement.

A. Well, my authority is the *Constitution of the United States of America* and the State of Minnesota, and the particular statute I cited and case law, none of which I have with me at the present time." (Emphasis added.)

* * * * * *

Plaintiff's Deposition (C. 59):

"Q. Is it your position that you had a legal right to attend this particular meeting of the parking committee of (C. 60) the Chamber of Commerce to which members of the council and members of the Housing and Redevelopment Authority were invited?

A. Well, I was attending a meeting of the city council and of WHRA.

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Q. My question is: Is it your position that you had a legal right to attend that meeting at that time and place?

A. The meeting of those two bodies, yes."

* * * * *

(C. 61):

"Q. I take it then that it is your position that the members of the Housing and Redevelopment Authority, as well as the members of the city council, when they were invited to attend a parking committee meeting of the Chamber of Commerce, and when they went there, they committed an illegal act, is that right?

A. While they were considering the public's business, yes.

Q. I repeat the other question: Do you have any authority, other than the statute that you refer to?

A. Yes, the Constitution of the United States of America and of the State of Minnesota."

* * * * *

(P. 51, 52):

"Q. All right. Now, then, to hold meetings without proper notice would therefore be your definition rendering it a secret meeting?

A. That would be one way in which a secret meeting could be held, yes, particularly if it was deliberate.

Q. And if it were deliberate it would violate a statute of the Laws of Minnesota in your opinion?

A. I would think so, yes.

Q. And would therefore be illegal? A. Yes."

(P. 55):

"Q. And in that letter you again set out generally your views that various members of the city council and other officers of the city, individually and in consort, had violated your rights as a citizen, had libeled you—

A. Is that the end of the question, Counsel?

Q. Well, it violated your constitutional rights as a citizen and it libeled you, is that right?

A. It is true that I pointed out that my rights as a citizen had been violated." * * *

State District Court Judge Stewart disposed of this alleged denial of a right of a citizen of the U.S.A. in the Order Granting Summary Judgment of Dismissal as follows:

> "(1) That there was no conspiracy among the defendants to deprive the plaintiff of any of his civil rights as a lawyer[2] or citizen * * *.
>
> "(2) That the plaintiff was not deprived by any of the defendants of any of his civil rights as a lawyer[2] or a citizen."

This determination disposed of the claims of denial of his civil rights by the public officials in all areas, in every instance, and each type of civil right claimed by plaintiff. This determination left in the case only three defendant individuals as to three separate alleged slanders.

In his memorandum Judge Stewart set forth his view that the public does not have a right to attend any but the meetings of the public bodies herein characterized as "Regular Meetings" pursuant to the statutory law[3] of Minnesota;[4] and that the statute is probably declaratory of the common law.

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[2]It was not claimed in the pleading or elsewhere that plaintiff was denied any right as a lawyer.

[3]Judge Stewart cited *M.S.A.* 462.441 and *M.S.A.* 471.705.

[4]In his memorandum Judge Stewart stated:

> "The plaintiff claims the defendants conspired to prevent him from appearing at meetings of the Council, the Housing and Redevelopment Authority, and the Planning Commission, and that pursuant to that conspiracy these bodies held meetings which were not public, and denied the plaintiff an opportunity to be present at such meetings.
>
> "In his deposition, and in answer to interrogatories, plaintiff states that he has attended every regular and special meeting of the council for about three years prior to the commencement of this action, * * *."

In so stating, Judge Stewart had reference to the meetings which are in this Petition characterized as "Regular Meetings" of the Council as distinguished from "Irregular Meetings." The plaintiff has at all times contended that the public has a right to attend all meetings at which a quorum is present and the public's business is discussed.

The ambiguity in Judge Stewart's statement initially leaves the incorrect impression that plaintiff in fact attended all "Irregular Meetings" of a quorum as well as "Regular Meetings"; and that there was no evidence that plain-

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> "It is clear, therefore, that all meetings of the Council, Planning Board and Housing Commission must be open to the public. Plaintiff claims that this law means that every time a group of councilmen or commissioners, or board members, in number amounting to a quorum congregate, that their meeting shall be open to the public. It is too plain for argument that this is not the meaning of the law. The language refers to regular or special meetings at which official business may be transacted. In fact, the statute is probably declaratory of the common law."

In determining the Motion for Summary Judgment Judge Stewart apparently could not ignore the well documented fact of the Adjourned "Regular Meeting" of WHRA held in secret in Winona National and Savings Bank on 1/14/65. Instead of making a determination that such "Regular Meeting" was contrary to Minnesota and common law, Judge Stewart treated it as a minor exception, stating:

> "Plaintiff does not point to any occasion on which the City Council, Planning Commission, or Housing & Redevelopment Authority held any regular, special or adjourned meeting in private, or ever attempted to transact any official business, except apparently on one occasion the Housing & Redevelopment Authority did, at a time other than a regular meeting, adopt some minor resolution. It, however, was not entered in any minutes, and was again taken up at the next regular meeting of the Authority at which plaintiff was present."

The memorandum lacks any specific comment upon a citizen's rights pursuant to the U. S. Constitution. It contains the general comment that:

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tiff was in fact denied admission to specific "Irregular Meetings," and was required to leave them, or had no advance knowledge of them, etc. The evidence in fact showed a very large number of such "Irregular Meetings," particularly of the Council, which were denied to plaintiff by one device or another.

Such ambiguity is, fortunately, alleviated where Judge Stewart subsequently makes clear that such statement had reference to "regular or special meetings at which official business may be transacted."

> "The public records, the plaintiff's lengthy deposition, and the answers to interrogatories clearly demonstrate that plaintiff was not denied any of his civil rights by any of the defendants. * * *"

However, it is therein further stated:

> "If there were any claim of substance by the plaintiff that he had been denied the right to be present at meetings, the motion on this feature of the case would have to be denied. The plaintiff, under such circumstances, would have a right to cross-examine the defendants, and thus attempt to establish the fact of a conspiracy, but the admitted facts here presented point to only one conclusion, namely, the plaintiff was not in fact deprived of any civil rights."

Plaintiff in his brief to the Minnesota Supreme Court argued as follows:

> "I. The rights and privileges of a citizen of Minnesota include:
>
> 1. a freedom to attend the meetings of municipal bodies when the public business is being discussed;
>
> * * *
>
> with the freedom to exercise and enjoy the same without official abuse or interference."

Plaintiff cited *U. S. Constitution,* Amendments IX and X, and *Thiede v. Town of Scandia Valley,* 217 Minn. 218, 14 N.W.2d 400, which case discusses "inherent and inalienable" rights of Americans at p. 405.

The Minnesota Supreme Court merely affirmed the lower court in its determination that plaintiff's civil rights had not been denied, stating:

> "2. Plaintiff's claim that he was denied his civil rights, alleged at length in the prolix pleadings, is generally an assault upon the 'illegal and improper' proceedings of the city council and public agencies interested in urban renewal. The trial court carefully considered these allegations, together with the most extensive files, depositions, and exhibits relating to them. It

concluded that each of these claims was without substance as a matter of fact and as a matter of law. We agree and think no useful purpose could be served by a reiteration of the trial court's comprehensive opinion."

Issue of right of a citizen to see the letters, papers and documents of the local public bodies.

Although not separately specified in the complaint, it is an alleged right fairly comprised within the alleged right to attend all meetings, being among the "lawful rights and privileges as a citizen, resident and taxpayer * * * of the U. S. A.," as set forth in complaint, par. 10, supra.

Hence, the manner by which the issue was raised in the state District Court was by the complaint, and the questions put to the plaintiff and his answers as set forth in Subsection 1 next above herein. The issue was raised in the Minnesota Supreme Court by the citation of *U. S. Constitution*, Amendments IX and X, and the case of *Thiede v. Town of Scandia Valley*, supra.

Neither the memorandum from the lower court, nor the opinion of the Minnesota Supreme Court, made any mention of the public's documents, maps and other information that have been denied to plaintiff.

"Public Figure."

The issue whether plaintiff was a "public figure" within the rule of *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.ed.2d 686, and *Curtis Publishing Co. v. Butts and Associated Press v. Walker*, 388 U.S. 130, 18 L.ed. 2d 1094, 87 S.Ct. 1975, reh. den. 389 U.S. 889, 19 L.ed.2d 197, 198, 88 S.Ct. 11, 13, and *Rosenblatt v. Baer*, 383 U.S. 75, 15 L.ed.2d 597, 86 S.Ct. 669, was first raised in the lower state court by defendants' Motions for Summary Judgment, and their supporting arguments. The judge of the State District Court granted defendants' Motions for Summary

Judgment of Dismissal for all the defendants dated 10/27/67, except as to isolated claims for separate slanders against defendants Ellings, Krier and Papenfuss. The two alleged libels were disposed of, however, by such dismissal. The Court stated in its memorandum accompanying such Order as follows:

> "There seems to be no doubt but that an attorney who is taking a leading part in a much publicized and somewhat bitter controversy with the Council and public bodies of the city with respect to public matters is a public figure in that community.,"

the Court citing *New York Times Co. v. Sullivan*, supra, and *Associated Press v. Walker*, supra.

In the Minnesota Supreme Court the decision of the lower court was affirmed as to all defendants defending against the allegations of libel; that Court stating at 173 N.W.2d 12, 18, as follows:

> "The judgment is affirmed in so far as it directs dismissal of any of plaintiff's actions; * * *."

The issue of "public figure" was specifically argued in the briefs upon appeal to the Minnesota Supreme Court.

ARGUMENT

REASONS WHY WRIT SHOULD BE GRANTED

1. Issue of right of a citizen to attend all meetings of the local public body.

Plaintiff contends that the people have the federal Constitutional right to know what the public officials are doing in their handling of the public's business. Plaintiff contends that it includes the orally stated plans, debates and decisions of the public body.

Plaintiff contends that when meeting as members of a public body, such as the Council, to discuss the public's business,

that they have no private business, only the public's business.

It is plaintiff's view that the same federal Constitutional Amendments that guarantee a right to attend meetings of the local public bodies guarantee the right of the citizen to see the letters, papers and documents of the local public bodies, and for essentially the same reasons. It is plaintiff's view that the right extends to all meetings where a quorum is present and the public business is discussed.

2. Issue of right of a citizen to see the letters, papers and documents of the local public bodies.

The freedom of the press is secured by the First Amendment. But the press, as a practical matter, can print a true report only of those facts which the reporters observe first hand. So they do inspect public records to secure facts. Hence press freedom includes a freedom to gather as well as to publish facts.

Such freedom is for the benefit of the people. It is not a freedom secured to newsmen as a privileged class apart. Hence the people have the same right of access to the public's facts as does the reporter. The newsman is merely a citizen's alter ego. The reporter serves both the convenience and the necessity of the citizen to determine such facts, for the citizen cannot be all places at once. In some situations determined principally by space requirements, practical necessity may require that the reporter substitute for the people, but such a circumstance is not present in the case at bar.

It is plaintiff's position that in seeking to see the letters, papers and documents of the public, the citizen enjoys all of the liberty afforded to the press by the First Amendment and Amendment XIV. It is further contended that such right is one "retained by the people" pursuant to Amendment IX,

and that it constitutes a "power * * * reserved * * * to the people" pursuant to Amendment X. It is contended that such "right" and "power" are vested in the people by the force of the American Revolution. Plaintiff here contends that Amendments IX and X serve to reinforce the right and power of the citizen beyond that secured to the press by the First Amendment.

It is further contended that such right and power is further secured to the citizen by the Fifth Amendment clause paraphrased as follows:

> "nor be deprived of * * * liberty * * * without due process of law."

This contention is premised upon the viewpoint that "liberty" includes more than freedom from slavery and from false arrest and imprisonment; and that it includes a freedom to pursue the lawful activity of getting the public's facts without major interference. It is plaintiff's position that it includes, for example, (1) a liberty to attend a meeting of a local public body without being forcibly carried out by armed policemen, even though no prosecution, fine or a term in jail follows the event; and (2) a liberty to view all of the public's documents pertaining to a project including those which some Planner has presumed to label as a "confidential report" or one which the local public body withholds because it is "merely preliminary."

The plaintiff asked of WHRA to see a "Marketability Study." This was denied to plaintiff. Of the Council he asked to see a particular map of the GNRP area but it was not produced for his inspection for over three months. When he requested to see a companion map, he was told that it was lost. It was never produced.

These are but two among several instances of such denials. The Council and the Planning Commission also refused to answer verbal inquiries about the public's business. The

withholding of such information cannot fairly be deemed to fall within the rule of de minimus, because such denials were concurrent with plaintiff's effort to learn the facts about the local urban renewal plans and program by seeking out unannounced meetings at odd times in both the City Hall and in the building of the defendant Chamber of Commerce.

The question presented by issues Nos. 1 and 2 is whether we have an open or a closed society at the level of local government.

3. Issue of "Public Figure."

In its determination the Supreme Court of Minnesota cited 173 N.W.2d 12, at p. 17, *New York Times Co. v. Sullivan*, supra; *Associated Press v. Walker*, supra; *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.ed.2d 262; and in footnote No. 12 stated:

> "Plaintiff was obviously a 'public figure' as the trial court found. In the words of Associated Press v. Walker * * * he had become such by the 'thrusting of his personality into the "vortex" of an important public controversy'."

It is submitted that plaintiff was not a public figure within such federal rule. Some of the activities and circumstances in regard to Gen. Walker were these, to-wit:

—On 9/26/62—made statement on radio at Shreveport promising that he would be there; on 9/27/62—made television appearance in Dallas and repeated the same sentiments; on 9/28/62—set out his views once again from New Orleans; on 9/29/62—held a press and television conference in which he called for violent vocal protest; on 9/30/62—held a final press conference at which he again urged defiance of court orders and federal power. (18 L.ed.2d 1113, ft. nt. 22.)

—"In contrast to the Butts article, the dispatch which concerns us in Walker was news which required immediate dissemination." (18 L.ed.2d 1113.)

—"He had pursued a * * * career * * * in the United States Army before resigning to engage in political activity. * * *." "Walker had his own following, the 'Friends of Walker'." (18 L.ed.2d 1102.) Walker admitted his presence on the campus and conceded that he had spoken to a group of students (18 L.ed.2d 1103).

—Spoke from the steps of the Confederate Monument (393 S.W.2d 675).

—Chief Justice Warren, concurring in the result, took the view that "as a class these 'public figures' have as ready access as 'public officials' to mass media of communication both to influence policy and counter criticism of their views and activities." (18 L.ed.2d 1116.)

In contrast there is no showing whatever that plaintiff ever made a radio statement, television appearance, or held a press conference. He had no following and was a part of no organization. Nor does the record show any public speech by plaintiff, except when he spoke to the public body. Plaintiff represented no one[5] except himself and his wife.

The record does not show that plaintiff ever solicited the newspapers, radio or television to publish any material, and no such publication was ever made.[6] Any statement of plaintiff's view which was reported in the press was made by plaintiff at a meeting of a public body; and some of such reports contained misquotations.

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[5]At one council meeting on 3/14/66 plaintiff appeared as a spokesman for four 3rd Street small business proprietors. Plaintiff stated that he did not necessarily represent the others even though speaking on their behalf, and that the views he expressed were not theirs in every instance.

[6]Excluded are verbal responses by plaintiff to the reporter's direct questions on about two occasions.

As stated in the complaint, par. 7, "plaintiff has sought to be informed concerning the activity of the public bodies, including 'urban renewal,' by attending and endeavoring to attend meetings thereof, by study, by inquiry, by objection and attempted objection to illegal and improper procedures and otherwise. Plaintiff has likewise sought to prevent the ultimate taking of his office building. * * * through 'urban renewal' by unlawful means."

Plaintiff has denied any unlawful conduct on his part. Defendants' criticism of plaintiff's conduct in three specific instances was at most a criticism of plaintiff's manners, which, in any event, could not have been considered by the lower state court on defendants' motion for summary judgment because controverted by plaintiff's testimony. Even in regard to the occasion when the Councilmen caused plaintiff to be carried out of the meeting bodily by police officers, defendants did not plead any unlawful conduct on the part of plaintiff.[7] At par. 10 of the Ellings' answer the allegation is merely that:

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[7]In defendant Ellings' Minnesota Supreme Court Brief at p. 10, without specifying the statute or ordinance pursuant to which plaintiff supposedly committed an offense, it is argued as follows:

> "Plaintiff had no right to attend the conference in question, his refusal to leave constituted a breach of peace which was committed in the presence of the officers, and the resultant arrest and subsequent detention was legal."

N.B.: This footnote merely takes note of the absence of unlawful conduct by plaintiff even in the view point of defendants. However, defendants' argument in such brief at p. 10 contains distortions of fact which render their legal argument even the more invalid. It is there argued as follows:

> "Appellant's complaint alleges at paragraph 19 that the Chief of Police, James McCabe, and two of his officers, James Bronk and Marlowe Brown, were guilty of falsely arresting him on June 15, 1964.
>
> "As pointed out in Judge Stewart's memorandum the record indicates that on that date a representative of the State Public Examiner was making a presentation to the City Council prior to its regular meeting and appellant, who was told he could not attend, forced his way into the room where this conference was being held, following which the

> "* * * plaintiff attempted to attend although requested repeatedly to leave, and upon his refusal to do so plaintiff was escorted from the meeting room by police officers of the City of Winona."

Also there was no testimony or other evidence of any illegal act or omission by plaintiff that evening. Although on that evening, which was April 12, 1965, plaintiff asked, neither the police officers nor the Chief of Police stated any charge against him. He was not prosecuted, although falsely arrested.

The situation here then is that plaintiff sought to protect his own rights independently and before the proper public

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president of the City Council summoned the Chief of Police and two officers who removed appellant from the room."

The record is clear that plaintiff has neither alleged nor testified to any false arrest and imprisonment on June 15, 1964, although that was the occasion when two representatives of the State Public Examiner's office attended a session of eight council members (Pl.'s Br. 11, 12) and two policemen were summoned.

Plaintiff's Complaint clearly alleges in paragraph 19 that the false arrest and imprisonment incident occurred on *April 12, 1965*, almost ten months later, and it was reported in the Daily News on April 13, 1965 (Pl.'s Br. p. 19, last par.). Defendant Ellings has attested that the arrest occurred on *April 12, 1965*.

Defendant Ellings' contrived argument which misstated the true date, i.e., "*April 12, 1965 alleged in paragraph 19 of the Complaint* of plaintiff's forcible removal by policemen, was apparently deemed necessary to conform to an unsupported fact determination by state District Court Judge Stewart.

By juggling the dates and events it appears the brief sought to lend some plausibility to a false view that plaintiff was "removed" by police from what defendant Ellings terms a "conference," as distinguished from a meeting of the Council held on *April 12, 1965*.

By employing the phrases following, to-wit:

> "* * * (plaintiff) (#1) who was told he could not attend, (#2) forced his way into the room * * *"

some slight pretext for plaintiff's removal is suggested. But there is not one iota of evidence that plaintiff ever forced his way into any room. And by placing such phrase #1 before #2 it was made to appear that plaintiff was told he could not attend before he entered the room (on the occasion that his false arrest did *not* take place). But there is no evidence whatever that on either the alleged and actual false arrest occasion on *April 12, 1965*, or on the incorrect date of June 15, 1964 the plaintiff was told he could not attend until after he was in fact in the room. The evidence is undisputed that on each occasion plaintiff, after entering the room, was ordered out.

bodies. The issue of urban renewal about which he sought information was, of course, an issue of importance to other citizens. Similarly when through his personal and individual interest in urban renewal he encountered secret meetings and the withholding of the public documents, his individual pursuit of facts again probed matters of public interest.

If this activity made plaintiff a "public figure" it was a new status. Unlike plaintiffs in *Butts and Walker,* supra, and the famous ball player in *Spahn v. Messner, Inc.,* 18 N.Y.2d 324, 221 N.E.2d 543, rem. 387 U.S. 239, 18 L.ed.2d 744, 87 S.Ct. 1706, and the former champion in *Dempsey v. Time, Inc.,* 43 Misc.2d 754, 252 N.Y.S.2d 186, affd. 22 App. Div.2d 854, 254 N.Y.S.2d 80, there is no evidence that plaintiff was a public figure, even locally, before he opposed urban renewal. Unlike *Walker* he could *not* "fairly be deemed a man of some political prominence." (*Associated Press v. Walker,* 18 L.ed.2d 1094, at p. 1102.)

The desirability of affording freedom to the press in reporting upon public officials is in the best interest of good and democratic government. However, plaintiff spoke out as a private citizen lawfully expressing a minority viewpoint to the proper public officials at their meetings in the public meeting halls. There is no evidence that he was a public figure.

The following quotations, some of them paraphrased, from *Walker* are suggested as particularly germane to the circumstances of the plaintiff:

> "at the threshold of this new constitutional development * * * we counsel(ed) against blind application of New York Times v. Sullivan." (At p. 1107.)
>
> * * * * *
>
> "The guarantees of freedom of speech and press were not designed to prevent 'the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of

public matters as seems absolutely essential.'" (At. p. 1108.)

Speaking of the conflicting considerations of the public's interest in being informed and the civilizing function of libel suits as a substitute for violence the Court stated:

"We fully recognize the force of these competing considerations and the fact that an accommodation between them is necessary not only in these cases but in all libel actions arising from a publication concerning public issues." (At p. 1106.)

The guarantee of the freedom of speech and press is a social necessity required for the

"maintenance of our political system and an open society." (At p. 1108.)

* * * * *

"The guarantee of freedom of speech and press were not designed to prevent the censorship of the press merely, but any action of the government by means of which it might prevent such free and general discussion of public matters as seems absolutely essential." (At p. 1108.)

* * * * *

"Our touchstones are that acceptable limitations must neither affect the impartial distribution of the news and ideas, * * * nor deprive our free society of the stimulating benefit of varied ideas because their purveyors fear physical or economic retribution solely because of what they choose to think and publish." (At p. 1108.)

* * * * *

"In New York Times Co. v. Sullivan we were adjudicating in an area which lay close to seditious libel, and history dictates extreme caution in imposing liability." (At p. 1110.)

* * * * *

"In the cases we decide today none of the particular considerations involved in New York Times is present. These actions cannot be analogized to actions for seditious libel. Neither plaintiff has any position in government which would permit a recovery by him to be viewed as a vindication of governmental policy." (At p. 1110.)

* * * * *

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"In the New York Times case, we held that a state cannot, consistently with the First and Fourteenth Amendment, award damages to a public official * * *." (At p. 1115.)

Unlike the *Butts* and *Walker* cases, the case at bar lies very close to seditious libel. The case is the converse of those where a public official is denied the remedy of libel because of the threat to the free discussion of a public issue. Plaintiff has exercised his lawful right to question and to oppose the plans and acts of the public bodies and the statements of public officials. Plaintiff has endeavored to seek out the meetings of the council and other bodies wherever held, and has objected to the discussion of the public's business in unannounced secret meetings. As set forth in plaintiff's letter of 11/14/64 to the president and members of the Council which was set forth verbatim in defendant Elling's brief, plaintiff spent an entire afternoon in a vain effort to learn from the public officials whether or not a meeting of any public body was to be held on the evening of 11/9/64. Such a meeting was in fact held that evening at the defendant Chamber of Commerce of Winona's building. All members of the Council and of WHRA were in attendance; defendant Krier, the vice-chairman of WHRA, presided; and the public's business was discussed.

Plaintiff has requested to see the public's documents including those held by the non-elective, virtually locally autonomous WHRA concerning an urban renewal program largely financed by the federal government. And WHRA was under the direct supervision and extensive control of the federal government. The statement of the case shows that inspection of some documents was denied to plaintiff by WHRA.

Although the local officials did not characterize plaintiff's activity as sedition, they reacted as if it were. Illustrative of such reactions are as follows:

Defendant Finkelnburg, chairman of WHRA:

"For more than a year Mr. Beatty has deluged the members of the authority, the city council and other officials with a series of letters complaining about the conduct of public affairs. * * *

"I think the time has now passed where we need to devote any further time to irresponsible, inconsistent attacks on the plan or upon the character and honesty of public officials who have the responsibility for the future of this city."

Defendant Papenfuss, chairman of Planning Commission and General Manager of defendant and alleged co-libelant Radio Station KAGE:

"In my opinion, anybody that is working for the betterment of the city in some form represents the city. * * * Some of them have official or unofficial positions in the community, and therefore, any time that these people are attacked, you are in effect attacking the city."

* * * * *

"At any time you [plaintiff] have spoken at a meeting you have attacked the things that these people I have just talked about are doing and therefore if you attack something that a person is doing, in my opinion that is the same as attacking the individual personally."

* * * * *

"You god damn son of a bitch, you little son of a bitch, you son of a bitch, I ought to throw you out the window."

Defendant Mayor Ellings:

"You [plaintiff] are a liar."

Defendant White, alleged co-libelant and Publisher of Winona Daily News and member of Planning Commission (plaintiff was singled out to be named in a particular editorial):

"Because he has been harassing the city."

President Briesath and the City Council had plaintiff carried bodily from "Irregular Meeting" by armed policemen when he was ordered out and declined to leave.

If a public official successfully pursued a libel action against the private citizen for a statement in one of such citizen's letters, the award would be subject to scrutiny in the eyes of the federal law to ascertain that it not be an award of damages to a public official by the state. Such award might be deemed an "economic retribution" for the citizen's statements to the Council about public business. As such it would not be permissible pursuant to *Sullivan* because of Amendments I and XIV.

In the converse situation here, using the same *Sullivan* argument, the very citizen whom the *Sullivan* doctrine would protect against the state is instead visited with the retribution of being denied a remedy against the officials who have allegedly libeled him.

The end result is that by voicing a position on a matter of the public's business a citizen ipso facto becomes fair game for libel by public officials. Such a doctrine, although efficacious for the silencing of all independent non-agreement, would be a strange doctrine indeed, in a democracy.

It should be noted that the Minnesota Supreme Court merely affirmed the Summary Judgment of Dismissal as to the alleged libels which are alleged in pars. 17 and 18 of the Complaint, stating: "Two of these, alleged as libel, were dismissed by the trial court and we affirm without detailed discussion." 173 N.W.2d 12, at p. 14.

The Minnesota Supreme Court's discussion of *Sullivan*, 173 N.W.2d 12, at p. 17, and *Walker*, 173 N.W. 12, at p. 17, concerned the alleged separate slanders only. It should nevertheless be noted that the stated federal requirement that a public figure:

> "could recover only on pleading and proving that the words written concerning him were the product of actual malice,"

includes "pleading" as one of the prerequisites. However, that prerequisite is not to be found in *New York Times v. Sullivan, Associated Press v. Walker* or *St. Amant v. Thompson*, 390 U.S. 727, 88 S.Ct. 1323, 20 L.ed.2d 262.

Unlike the case at bar, *Sullivan, Walker* and *Butts* were tried by juries.

District Court Judge Stewart determined as follows:

> "(3) That none of the defendants, other than defendants Randolph K. Ellings, Joseph E. Krier and Jerry Papenfuss committed any actionable tort against the plaintiff."

This determination disposed of the libels as incidents of the alleged conspiracy and as individual torts. Judge Stewart's memorandum cited *Sullivan, Butts* and *Walker;* and he reasoned that plaintiff was a "public figure in that community." The end result is that both the public official and the news media are free to libel the citizen critic.

It would appear that the whole purpose of *Sullivan* is thereby thwarted. For in *Sullivan* it is stated:

> "Raising as it does the possibility that a good faith critic of government will be penalized for his criticism, the proposition relied on by the Alabama courts strikes at the very center of the constitutionally protected area of free expression." (11 L.ed.2d 695, 713.)

Being denied the opportunity to repair the damage to his reputation is indeed a harsh penalty to the citizen. This must be a misapplication of the *Sullivan* rule. It will serve well to silence dissent!

In the classic sedition cases it was the newspaper encountering the wrath of the public official for its comments upon the governmental activity of such official. In the case at bar the press is aligned with the public officials in support of

urban renewal and other, in their stated view, "constructive" programs, as is their right. And the news media is allegedly included in the conspiratorial plan to interfere with the civil rights of and to ruin plaintiff's reputation. In addition plaintiff privately chided the news media for not reporting secret meetings known to such media.

Since there is no showing that the citizen here has any access to the news media to defend his reputation, there is this additional hazard to free comment upon public affairs in a misapplication of the *Sullivan* rule.

In conclusion it is here contended that the Minnesota Court has misapplied the rights guaranteed by Amendments I, V and XIV, and the *Sullivan* rule as well. Also, the state courts had decided this federal question of substance although the United States Supreme Court has not heretofore made a determination upon analogous facts. Also, the state courts have decided the question in a way probably not in accord with the applicable decision of the United States Supreme Court.

PRAYER FOR RELIEF

Your petitioner prays that a writ of certiorari issue to review the judgment of the Supreme Court of Minnesota; and that, upon such review, such judgment be reversed and remanded.

Respectfully submitted,

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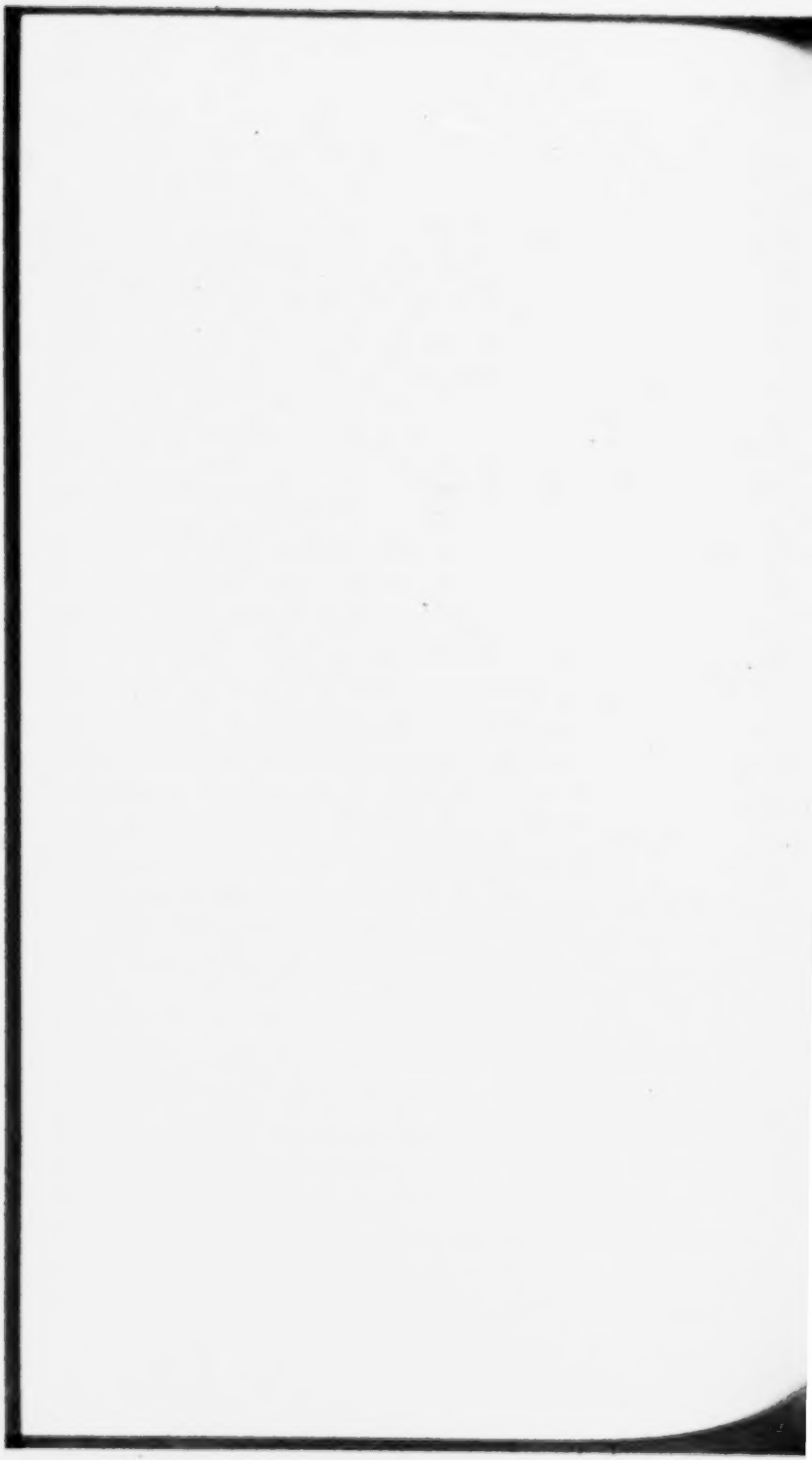

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APPENDIX A

No. 31 Winona County Peterson, J.

Martin A. Beatty,

Appellant,

41315 vs.

Randolph K. Ellings, et al.,

Respondents.

SYLLABUS

1-2. The granting of summary judgment of dismissal against plaintiff, in action against numerous defendants alleging a conspiracy to defame and degrade him and to deny him his civil rights, is affirmed.

3. The denial of summary judgment to three individual defendants alleged to have uttered isolated slanders against plaintiff, a public figure, in the course of public debate about a public issue, is accorded discretionary review and reversed.

Affirmed in part; reversed in part; and remanded, with directions.

Heard before Knutson, C. J., and Nelson, Sheran, Peterson and Frank T. Gallagher, J.J.

OPINION

PETERSON, Justice.

The issues in this appeal arise out of an action by plaintiff, Martin A. Beatty, pleading separable causes of action against numerous defendants, public bodies and public officials for the most part, tied together by an allegation that they maliciously conspired to defame him and deny his civil rights. The trial court granted summary judgment of dis-

missal for the defendants except only as to isolated claims against three individuals. Plaintiff has appealed of right from the summary judgment against him, and the three remaining defendants have petitioned for discretionary review of the judgment with respect to them.

This litigation is an outgrowth of a long-standing and vigorous public controversy over urban renewal and redevelopment in Winona, Minnesota. Defendants, either as public officials or interested private persons, have been proponents of urban renewal. Plaintiff, a resident of Winona, has been an active opponent of these public programs, perhaps in part because he is, as his complaint discloses, the owner of an affected building. The present litigation, considered in the context of the controversy,[1] compels a conclusion that the claims of plaintiff are without substantial merit and, except as to certain claims not dismissed by the trial court, do not warrant extended discussion.

1. Plaintiff's basic claim of a conspiracy among these numerous defendants is, as the trial court found, clearly without substance. The voluminous pretrial discovery proceedings evince the fullest opportunity for plaintiff to uncover the existence of a conspiracy. All that appears, however, is the obvious fact that defendants shared a common interest in urban renewal and were not favorably disposed to plaintiff's activities in opposition. A natural community of interest among participating proponents in a public debate, including agreement among public officials for the adoption of a particular program, forms no rational basis for any inference that an affront by any of them to their

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[1]This controversy has been here before upon plaintiff's appeal from an order dismissing his action for a declaratory judgment invalidating action of the Winona City Council creating the Winona Housing and Redevelopment Authority. See, Beatty v. Winona Housing & Redevelopment Authority, 277 Minn. 76, 151 N.W.(2d) 584.

common opponent occurred pursuant to a conspiracy to degrade him or deny him his civil rights.

2. Plaintiff's claim that he was denied his civil rights, alleged at length in the prolix pleadings, is generally an assault upon the "illegal and improper" proceedings of the city council and public agencies interested in urban renewal. The trial court carefully considered these allegations, together with the most extensive files, depositions, and exhibits relating to them. It concluded that each of these claims was without substance as a matter of fact and as a matter of law. We agree and think no useful purpose could be served by a reiteration of the trial court's comprehensive opinion.

3. Plaintiff makes several claims against different defendants for defamation arising out of meetings of various public bodies considering the subject of urban renewal. Two of these, alleged as libel,[2] were dismissed by the trial court and we affirm without detailed discussion. Three of these, alleged as slanders, were not dismissed by the trial court:

(a) At a meeting of the Winona Planning Commission on December 23, 1965, defendant Jerry Papenfuss, one of the commissioners, became engaged in heated argument with the

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[2]One alleged libel consisted of a news item in the Winona Daily News on August 20, 1965, which reported a speech by plaintiff, in which he charged that "city planning consultants" had concocted a "scheme" for urban renewal. The defendant newspaper added a paragraph reporting the comments of unnamed redevelopment "officials" that plaintiff's claims as to the cost of such scheme were "unfounded."

The other incident alleged by plaintiff as a libel occurred on March 15, 1966, following a speech by plaintiff at a meeting of the city council, in which he charged that members of the housing and redevelopment authority had given information to some persons from which they had reaped private profit. On the following day defendant William O. Finkelnburg, chairman of the authority, with the assistance of its legal counsel, dictated a statement to the counsel's secretary and subsequently read it at a meeting of the authority that same evening. Finkelnburg labeled plaintiff's charges as "irresponsible, inconsistent attacks on the plan or upon the character and honesty of public officials" and deplored the "fact that Mr. Beatty feels it necessary to stoop to this shameful tactic." The statements were published in the defendant public media.

plaintiff as the result of plaintiff's accusations against the defendant Randolph K. Ellings, then mayor of Winona. Papenfuss referred to plaintiff three times as a "son-of-a-bitch," prefaced by certain other adjectives.

(b) At a meeting of the city council on June 15, 1964, defendant Ellings allegedly responded to the unfounded accusation of plaintiff that the council had conducted secret meetings with these words: "You are a liar." And, at a meeting on September 8, 1964, again as part of a heated exchange, Ellings suggested to plaintiff that they could settle their differences in the adjoining alley, which plaintiff took to mean that the debate would be resolved by fisticuffs. The trial court, in denying Ellings' motion for summary judgment, referred only to the second incident, terming it "a slanderous, or possibly a threatened, assault." [3]

(c) The third alleged slander involves statements made to plaintiff by defendant Joseph E. Krier, vice chairman of the Winona Housing and Redevelopment Authority, at its meeting on July 21, 1964. This meeting was held in a room at the Winona National and Savings Bank, of which Krier was a vice president. Plaintiff, in a letter to Arthur A. Gallien, executive director of the authority, had protested the practice of meeting at that time and place, urging that meetings be held in the municipal building and at an hour more convenient to those wishing to attend. Plaintiff did attend the meeting, and at that time and place, as alleged in the complaint, Krier spoke these words to plaintiff in the presence of Gallien:

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[3] It is most doubtful that these words constitute an assault and, in any event, that aspect of the alleged tort is, under all the circumstances, de minimis. At the time defendant Papenfuss had labeled plaintiff as a son-of-a-bitch, he had added, "I ought to throw you out the window!" Plaintiff at that time instituted a criminal complaint against Papenfuss for disorderly conduct, which resulted in an acquittal after a 2-day jury trial. Plaintiff instituted no such proceedings against defendant Ellings. These incidents do, of course, reveal the verbal pyrotechnics in this controversy.

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"What are you doing here?"

"Why aren't you in your office? You must not have any law business that you can spend all of your time attending meetings."

"You are hurting yourself."

"You have lost a great many friends."

"You are fighting a lost cause and you should have sense enough to know it."

"Do you know what you are doing?"

"I think you ought to see a psychiatrist." [4]

Plaintiff, notwithstanding his allegations that the statements of defendant Krier were inherently defamatory, republished the event himself. He visited the office of E. L. King, chairman of the bank's board, the same day and reported "what had gone on and how [he] had been slandered," and on July 22 he sent King a letter to "serve as a memo of my conversation of yesterday afternoon with you at your office." [5] On November 14, 1964, plaintiff wrote a similar letter to the members of the city council and the members of the housing and redevelopment authority. He also sent copies of the letter to the 450 resident members of the Winona

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[4]Defendant Krier added these words: "Who's behind this? Does your wife put you up to this?" Plaintiff pleads as the innuendo of these latter words "that plaintiff was dominated by his wife." We think the important issue of defamation relates only to the suggested need for psychiatric consultation. Our disposition of that issue in any event, equally disposes of any suggestion that this aggressive plaintiff was wife-dominated.

[5]The letter in part reads as follows: "I explained that I was protesting the conduct and slanders of Mr. Krier. I stated that such conduct was calculated to discourage me from attending future meetings. I commented on the fact that Mr. Krier is an officer of your bank. I also told you that I did not think that Mr. Krier would have dared to make such remarks without the knowledge of the other bank officers. I explained that a further purpose of my visit was to insure that no officer or employee of your bank would try to discourage me from attending such public meetings at your bank in the future."

Chamber of Commerce.[6] If the letter was not a total reiteration of the allegedly slanderous statements, it was otherwise remarkable for its absence of reference to them.[7]

We have determined to exercise discretionary review in this case even though appellate review of orders denying motions for summary judgment will be granted only in most unusual situations. See, Rule 105.01, Rules of Civil Appellate Procedure. The surviving claims against these three individual defendants are but the tag ends of plaintiff's actions against the numerous other defendants rather similarly situated. The issues arise out of the same public controversy and involve utterances of public officials in the course of public meetings relating to that controversy. The trial of these isolated claims might well necessitate long and expensive trial proceedings, an unwarranted imposition upon both litigants and the public in view of our conclusion that plaintiff's claims are as a matter of law without sub-

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[6]This letter in part states: "The meetings of the Winona Housing and Redevelopment Authority are held once a month at 1:10 P.M. on Tuesday, when citizens are necessarily at work. They are held in a small cubicle-sized roomlet, in a private building, the Winona National & Savings Bank. A citizen who has the audacity to squeeze into this meeting can expect to be as grossly abused as he would be at a City Council Meeting. He can expect, for example, that Mr. Joe Krier, the Vice-chairman of this public body, which chooses to function as an oligarchy, will inquire:

"'What are you doing here?'

"'Why aren't you at your office?'

"He can anticipate that Mr. Krier will slander him, and make insulting remarks about a member of his family and about his professional competence."

[7]Plaintiff's letter to King contains all of Krier's alleged statements as printed in the complaint, *supra*, except that the remarks relating to defendant's (sic) wife were simply summarized as "insulting remarks about my wife," in sharp contrast to the allegations of the complaint that it was a reflection upon plaintiff himself. Plaintiff's more widely circulated letter of November 14, however, omitted reference to Krier's statement about plaintiff's need to see a psychiatrist.

stantial merit.[8] We are convinced that the interest of justice will best be served by dismissal of the entire litigation and remanding plaintiff to his original forum of public debate.

We hold that the words spoken by the three defendants, even assuming that they were defamatory, are not actionable. Not all abusive or vulgar epithets, we observe in passing, are inherently defamatory. Calling a man a "son-of-a-bitch," unworthy as it is in public debate, could not reasonably be construed as an actual reference to his ancestry or even as to his general character. Calling a man a "liar" may in many situations reflect upon a man's character, but it is not necessarily so; it is at least no different than labeling an unfounded accusation as a "lie." An invitation to an alley fight would not in any setting constitute slander. To suggest that a man should seek psychiatric advice, spoken in the context of his activities in connection with an urban renewal controversy, does not necessarily connote an accusation by the speaker that he is insane.[9] We need not decide, however, whether these words were nondefamatory as a matter of law, because they are, for other and more basic reasons, not actionable.

First, slander is not actionable without allegation and proof of damage unless the defamatory words are actionable

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[8]Discretionary review in such a case was granted in Time, Inc. v. McLaney (5 Cir.), 406 F.(2d) 565, under the somewhat comparable provisions of 28 U.S.C.A., § 1292(b), for discretionary review by the United States Courts of Appeal within the Federal system. Plaintiff, questioned on oral argument as to his position on the question of discretionary review, interposed no objection to it.

[9]Calling a person "insane" undoubtedly could be considered defamatory if used in the sense of being mentally disordered or incapable of functioning competently, but to label an activity or idea as "insane" is probably no more than a figure of speech characterizing the activity or idea as foolish or ridiculous.

per se. Defamatory words spoken concerning a professional man are not actionable per se unless spoken with direct reference to his professional activity.[10] Plaintiff did allege that Ellings' reference to him as a liar and Krier's reference to him as needing psychiatric consultation were damaging to him "both professionally and otherwise"; but as to all other spoken words he alleged only that they were damaging to his "reputation." The statements of Ellings and Krier were no more directed to plaintiff's professional activity than were those of any other of the defendants. Whatever the sufficiency of the requisite allegations as to damage, there is utterly no evidence of such damage. Plaintiff admitted in a discovery deposition that his law practice had not suffered as the result of any act of defendants.[11]

Second, and more important, the allegedly slanderous words were conditionally privileged, in a constitutional sense, so that plaintiff, as a public figure, could recover only upon pleading and proving that the words spoken or written concerning him were the product of actual malice. New York Times Co. v. Sullivan, 376 U.S. 254, 84 S.Ct. 710, 11 L.ed.(2d) 686, 95 A.L.R.(2d) 1412; Associated Press v. Walker, 388 U.S. 130, 87 S.Ct. 1975, 18 L.ed.(2d) 1094; St.

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[10]See, McDermott v. Union Credit Co., 76 Minn. 84, 78 N.W. 967, 79 N.W. 673, and High v. Supreme Lodge, 214 Minn. 164, 7 N.W.(2d) 675, 144 A.L.R. 810. See, also, Gurtler v. Union Parts Mfg. Co., 285 App. Div. 643, 140 N.Y.S.(2d) 254, affirmed, 1 N.Y.(2d) 5, 132 N.E.(2d) 889; Fitzgerald v. Young, 89 Neb. 693, 132 N.W. 127. Barry v. Baugh, 111 Ga. App. 813, 143 S.E.(2d) 489; Sweeney v. Philadelphia Record Co. (3 Cir.), 126 F.(2d) 53; Taylor v. American Export Lines, Inc. (S.D.N.Y.), 222 F. Supp. 1022. But cf. Pattangall v. Mooers, 113 Maine 412, 94 A. 561; Sweeney v. Schenectady Union Pub. Co. (2 Cir.), 122 F.(2d) 288; Remington v. Bentley (S.D.N.Y.), 88 F.Supp. 166; Munafo v. Helfand (S.D.N.Y.), 140 F.Supp. 234.

[11]He does assert that the expenses of his prior litigation, footnote 1, *supra*, constituted a special damage. Obviously these are neither special damages nor expenses attributable in anyway to the alleged slanders in the instant case.

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Amant v. Thompson, 390 U.S. 727, 88 S.Ct. 1323, 20 L.ed. (2d) 262.[12] To defeat that privilege, it was incumbent upon plaintiff to plead and prove, as to each statement, that the statement was false and that it was written or spoken "with knowledge that it was false or with reckless disregard of whether it was false or not," New York Times Co. v. Sullivan, 376 U.S. 254, 279, 84 S.Ct. 710, 726, 11 L.ed.(2d) 686, 796, 95 A.L.R.(2d) 1412, 1435—that is, that the defendant "in fact entertained serious doubts as to the truth of his publication." St. Amant v. Thompson, 390 U.S. 727, 731, 88 S.Ct. 1323, 1325, 20 L.ed.(2d) 262, 267.[13] Plaintiff generally alleged that the defamatory words were "maliciously" spoken, but that is not a sufficient pleading of constitutional malice. More importantly, there was no evidence of such

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[12]Plaintiff was obviously a "public figure," as the trial court found. The record discloses that at the time plaintiff commenced these actions he had attended almost every formal meeting of the city council since the middle of 1963. He addressed these council meetings on several occasions, and on some of these occasions his public statements were reported in the local media. He attended meetings of two other public bodies interested in urban renewal, the planning commission and the housing and redevelopment authority. And he insisted upon attending a meeting of such private body as the Winona Chamber of Commerce when, on one occasion, its meeting was attended by members of the city council and the housing and redevelopment authority. His views questioning or opposing proposed urban renewal projects were also conveyed by letter to various state and Federal officials. In the words of Associated Press v. Walker, 388 U.S. 130, 155, 87 S.Ct. 1975, 1991, 18 L.ed.(2d) 1094, 1111, he had become such by the "thrusting of his personality into the 'vortex' of an important public controversy."

[13]The focus is on the status of plaintiff as a public figure and not on the status of the defendants. A somewhat similar focusing on the status of the defendants exists for statements made by members of municipal councils or other governing bodies of political subdivisions in the course of public proceedings, Jones v. Monico, 276 Minn. 371, 150 N.W.(2d) 213, but the seemingly more sweeping constitutional privilege makes it unnecessary to rest decision on the latter ground.

actual malice.[14] The trial court in denying defendant's motion for summary judgment stated that "a possible question of privilege would be for the jury." But the question of privilege exists as a matter of law.

The judgment is affirmed insofar as it directs dismissal of any of plaintiff's actions, reversed insofar as it directs trial of plaintiff's actions against defendants Ellings, Krier, and Papenfuss, and is remanded with directions that summary judgment for those defendants be entered.

Affirmed in part, reversed in part, and remanded, with directions.

Upon petition for rehearing, the opinion in the above matter filed on November 7, 1969, is withdrawn and the above opinion substituted in lieu thereof. The petition is denied.

(Endorsed. Filed December 12, 1969. John McCarthy, Clerk, Minnesota Supreme Court.)

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[14]It might be inferred that the statements of defendants Papenfuss and Ellings demonstrated some ill will. And plaintiff asserts that the words of defendant Krier were spoken "angrily and sarcastically" (although defendant Krier asserted that they were spoken as an expression of genuine personal concern). Mere proof of personal ill will, at least without more, as we observed in Rose v. Koch, 278 Minn. 235, 154 N.W.(2d) 409, does not meet the constitutional standard of actual malice. Cf. Goldwater v. Ginzburg (2 Cir.), 414 F.(2d) 324.

APPENDIX B

STATE OF MINNESOTA, SUPREME COURT

Martin A. Beatty,

Appellant,

vs. 41315

Randolph K. Ellings, City of Winona, Housing and Redevelopment Authority of Winona, George M. Robertson, Jr., James Bronk, Marlowe Brown, James McCabe, Harold Briesath, Daniel Bambenek, Henry V. Parks, Muriel Ollom, Jim D. Mohan, Harold Thiewes, James V. Stoltman, Neil Sawyer, Barry Nelson, David L. Johnston, Donald Klagge, Jerry Borzyskowski, Allyn S. Morgan, Jr., L. W. Goldberg, N. J. Fischer, Joseph E. Krier, William J. Thurow, Frank Cunningham, William O. Finkelnburg, E. J. Sievers, Philip Baumann, James T. Schain, Norman E. Indall, William F. White, James Foster, Jerry Papenfuss, Frank G. Mertes, Donald Gray, Howard Keller, Republican Herald Publishing Company, James B. Goetz, Radio Station KAGE, Gem Radio Stations Co., James B. Goetz, Merlin J. Meythaler and Rex N. Eyler, co-partners, doing business as Winona Broadcasting Co., KWNO Broadcasting Co., Chamber of Commerce of Winona, Donald Stone, Arnold Stoa,

Respondents.

[JUDGMENT]

Pursuant to an order of Court heretofore duly made and entered in this cause it is determined and adjudged that the judgment of the Court below, herein appealed from, to-wit, of the District Court within and for the County of Winona be and the same hereby is in all things affirmed in part; reversed in part; and remanded, with directions in accordance with the opinion.

Dated and Signed January 5, 1970.

By the Court.

Attest: /s/ JOHN MCCARTHY

Clerk.

STATE OF MINNESOTA)
) ss.
SUPREME COURT)

I, John McCarthy, Clerk of said Supreme Court, do hereby certify that the foregoing is a full and true copy of the Entry Judgment in the cause therein entitled, as appears from the original remaining of record in my office; that I have carefully compared the within copy with said original and that the same is a correct transcript therefrom.

Witness my hand and seal of said Supreme Court at the Capitol, in the City of St. Paul, March 23, 1970.

JOHN MCCARTHY, Clerk.
By /s/ WAYNE TSCHIMPERLE, Deputy.